



March 17, 1999

Ms. Linda Wiegman  
Supervising Attorney  
Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR99-0763

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 122873.

The Department of Health (the "department") received a request for "copies of the file maintained by your agency regarding Consolidated Care Crew Home Health Agency, Inc." Documents responsive to that request were provided to this office for review. You assert that the requested information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with various other state and federal laws. Section 552.101 protects from disclosure information that is made confidential by law. You also assert that portions of the records are excepted from disclosure under section 552.103(a) of the Government Code.

We note initially that the submitted records include some documents that are public. Federal regulations require the department to release the HCFA 2567, statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988). These forms must be released.

Additionally, some of the records at issue are medical records and access to these records is specifically governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or

maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the city police department obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records.

You contend that some of the documents at issue are excepted from disclosure under section 149.009(d) of the Health and Safety Code, in conjunction with section 552.101 of the Government Code. You state that these documents were used or developed as part of a complaint investigation in a home and community support services agency. Section 142.009(c) provides that the department must investigate "each complaint received regarding the provision of home health, hospice, or personal assistance services." Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or

(5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.

You indicate that the records you marked are reports, records, and working papers that were used or developed during the investigation. Based upon our understanding that there has been no consent for release and that no other exception to disclosure is applicable, we agree that the documents in question are confidential in their entirety under section 142.009(d).

You assert that all of the remaining documents are protected from disclosure under section 552.103(a) of the Government Code. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.), *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You have demonstrated that litigation is reasonably anticipated and that the information at issue is related to the litigation. Many of the records at issue are protected from disclosure under section 552.103(a). However, some of the submitted records for which you assert section 552.103(a) protection have been seen by the opposing party in the anticipated litigation. These records may not now be withheld from disclosure under section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). We will address your remaining arguments as to the records that may not be protected under section 552.103(a).

You assert that any social security numbers and related records contained in the information are confidential under federal law. Section 405(c)(2)(viii)(I) of title 42 of the United States Code provides that "social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential." This provision protects social security numbers, in any form, that would identify a particular social security number as belonging to a certain individual, if such information was obtained or maintained by a governmental body pursuant to a provision of law enacted on or after October 1, 1990. Open Records Decision No. 622 at 3 (1994). Although it does not appear that such information is in the documents that is not otherwise protected from disclosure under section 552.103(a), we agree that this information is confidential wherever it is found.

Section 552.101 protects from disclosure information protected under a right of common-law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public

disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). We have noted that some information must be de-identified in order to protect the common-law privacy interests of certain individuals.

You assert that some of the information is protected under the informer's privilege aspect of section 552.101 of the Government Code. Texas courts long have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act, Open Records Decision No. 549 at 4 (1990). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the "informer's privilege" aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 at 3 (1988), 391 at 3 (1983). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990). However, the exception is inapplicable if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 at 2 (1978).

As previously indicated, various documents are protected in their entirety under section 552.103(a). To the extent that the informant's identity is contained in any of the remaining documents, we agree this information may be withheld from disclosure.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 122873

Enclosures: Submitted documents

cc: Mr. Larry W. Johnson  
Cowles & Thompson  
901 Main Street, Suite 4000  
Dallas, Texas 75202-3793  
(w/o enclosures)